

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

OPTIS WIRELESS TECHNOLOGY, LLC,
OPTIS CELLULAR TECHNOLOGY, LLC,
UNWIRED PLANET, LLC, UNWIRED
PLANET INTERNATIONAL LIMITED,
AND PANOPTIS PATENT MANAGEMENT,
LLC,

Plaintiffs,

v.

APPLE INC.,

Defendant.

Civil Action No. 2:19-cv-66-JRG

JURY TRIAL DEMANDED

**PLAINTIFFS' SUR-REPLY IN SUPPORT OF THEIR
OPPOSITION TO APPLE'S MOTION TO CONTINUE TRIAL**

Throughout the COVID-19 crisis, this Court has taken thoughtful and careful measure to protect the health of jurors, attorneys, and Court staff while balancing its constitutional obligation to adjudicate claims that are before it in a timely and fair manner.

Plaintiffs presented independent modeling data from the University of Washington Institute for Health Metrics and Analysis showing increasing number of cases due to COVID-19 through well after October under even the most optimistic projections.¹ Plaintiffs also noted that Apple's suggestion that trial should be delayed until the start of flu season and the beginning of the second wave modeled by the University of Washington made no sense. Apple's expert did not respond to any of these data.

¹ <https://covid19.healthdata.org/united-states-of-america>.

On July 14, 2020, the Director of the Centers for Disease Control made clear that in the foreseeable future this summer is the safest period:

“the fall and the winter of 2020 and 2021 are going to be probably one of the most difficult times that we've experienced in American public health[.]”²

Apple claims that the experience of major cities, such as “New York” and “Boston,” can be analogized to the Eastern District of Texas. Apple’s retained doctor did not make this argument. Moreover, major cities that had effectively stopped transmission rates, such as Seoul, have experienced a significant second wave.³

Apple claims that it cannot imagine how a delay in trial “would advantage Apple” and that any suggestion of tactics is a “smear.” The facts, which Apple fails to mention, speak for themselves:

- On July 2, 2020, Apple told the PTAB that it should ignore its controlling precedent and not dismiss Apple’s late filed IPRs against three of the patents-in-suit, even though any IPR would not initiate, let alone complete, until after the currently scheduled jury trial. In support of its arguments, Apple told the PTAB that “uncertainties created by the COVID-19 pandemic” make it possible that this Court will stay the case [and that] ... [i]n recent weeks, Texas has experienced a significant increase in COVID-19 cases. Ex. 1072. By contrast, the Board has continued to hold hearings remotely.” Ex. 7, at 5.⁴
- On July 9, 2020, Plaintiffs’ pointed out to the PTAB that Apple had failed to disclose an important fact: “Apple fails to report that Judge Gilstrap has recently denied a party’s request to continue a trial due to COVID19.” Ex. 8, at 1.

² https://www.cnn.com/world/live-news/coronavirus-pandemic-07-14-20-intl/h_0a1e9579c6acb8adc5a8cd454f221d59.

³ <https://www.bbc.com/news/world-asia-53135626>.

⁴ Attached to the Sur-Reply Declaration of Jason Sheasby.

- On July 14, 2020, not only the same law firm that represents Apple in the PTAB, but some of the same lawyers filed Apple's motion to stay this case before this Court because of COVID-19, without disclosing to the Court that it was using the potential for a stay as a basis for avoiding rejection of its late-filed IPRs in the PTAB.

This Court has taken prudent and cautious measures to balance its constitutional obligations and the needs of the citizens of the Eastern District of Texas. Nothing has changed since the last time Apple sought an indefinite continuance of this trial other than the fact that we know that on a relative basis now is the safest time to hold a trial in the foreseeable future.

Dated: July 20, 2020

Respectfully submitted,

/s/ Samuel F. Baxter

Samuel F. Baxter
Texas State Bar No. 1938000
sbaxter@McKoolSmith.com
Jennifer Truelove
Texas State Bar No. 24012906
jtruelove@McKoolSmith.com
McKOOL SMITH, P.C.
104 E. Houston Street, Suite 300
Marshall, TX 75670
Phone: (903) 923-9000; Fax: (903) 923-9099

Steven J. Pollinger
Texas State Bar No. 24011919
spollinger@McKoolSmith.com
McKOOL SMITH, P.C.
300 W. 6th Street Suite 1700
Austin, TX 78701
Phone: (512) 692-8700; Fax: (512) 692-8744

Jason Sheasby – Lead Counsel (pro hac vice)
jsheasby@irell.com
Hong Zhong, PhD (pro hac vice)
hzhong@irell.com
Andrew Strabone (pro hac vice)
astrabone@irell.com
IRELL & MANELLA LLP
1800 Ave of the Stars, Suite 900
Los Angeles, CA 90064

Phone: (310) 203-7096; Fax: (310) 203-7199

M. Jill Bindler
Texas Bar No. 02319600
jbindler@grayreed.com
GRAY REED & MCGRAW LLP
1601 Elm Street, Suite 4600
Dallas, Texas 75201
Phone: (214) 954-4135; Fax: (469) 320-6901

**ATTORNEYS FOR PLAINTIFFS OPTIS
WIRELESS TECHNOLOGY, LLC, OPTIS
CELLULAR TECHNOLOGY, LLC, AND
PANOPTIS PATENT MANAGEMENT,
LLC**

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served via electronic mail on all counsel of record on July 20, 2020.

/s/ Samuel F. Baxter

Samuel F. Baxter